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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

BERNADETTE MONTEGANI,

Plaintiff and Appellant,

v.

KARON A. JOHNSON et al.,

Defendants and Respondents.

F057304

(Super. Ct. No. 630059)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County.

William A. Mayhew, Judge.

Mayall, Hurley, Knutsen, Smith & Green and Steven A. Malcoun for Plaintiff and Appellant.

Dowling, Aaron & Keeler, William J. Keeler, Jr., Leigh W. Burnside and Stephanie Hamilton Borchers for Defendants and Respondents.

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This is another in the series of appeals generated by siblings fighting over their deceased mother's estate. (See *Montegani v. Johnson* (2008) 162 Cal.App.4th 1231.) In this matter, plaintiff sued her brother and two sisters, alleging that they unduly influenced their mother to exclude plaintiff as a beneficiary of two annuities totaling \$400,000. The

siblings filed a demurrer contending the lawsuit was barred by (1) res judicata or collateral estoppel based on this court's 2003 decision in case No. F041158 or (2) the statute of limitations. The trial court sustained the demurrer, concluding (1) the doctrine of collateral estoppel applied and (2) plaintiff had split her cause of action.

We conclude that the same primary right that is the basis of this lawsuit was also the basis of plaintiff's previous action and, therefore, res judicata operates as a bar to this lawsuit. The judgment will be affirmed.

### **FACTS AND PROCEEDINGS**

This appeal concerns a demurrer and, as a result, the material facts are taken from the allegations of the complaint and documents subject to judicial notice.

Plaintiff Bernadette Montegani and defendants Karon A. Johnson, Peter A. Cassinerio, and Agnes M. O'Connor are the children of Lena M. Cassinerio, who died in November 2001 at the age of 75.

On March 19, 2002, Montegani filed an action entitled *Montegani v. Johnson et al.* (Super. Ct. Stanislaus County, 2002, No. 309454). The caption of Montegani's complaint for damages in case No. 309454 identified its legal theory of recovery as intentional interference with economic relations.

The 2002 complaint included the following allegations. Defendants intentionally and knowingly interfered with Montegani's inheritance and her relationship with her mother by, among other things, (1) taking steps to isolate their mother during the last few months of her life, (2) making untrue derogatory statements about Montegani to their mother and, (3) influencing their mother to change the distribution of her estate for defendants' benefit. The assets held by Lena M. Cassinerio before her death included a portfolio of municipal bonds and stocks as well as two annuities valued at approximately \$400,000. Montegani had been named as a beneficiary of the annuities and would have received approximately \$100,000. Pursuant to a plan to control their mother's estate, defendant Johnson secured a power of attorney over her mother's finances and, with the consent and agreement of Peter A. Cassinerio and O'Connor, "transferred the entire

portfolio [of stocks and bonds] inclusive of the annuity policies to [a broker's] office in Modesto and changed the beneficiaries of the annuity policies to exclude [Montegani].”

Defendants responded to the allegations in the 2002 complaint by filing a demurrer. The superior court sustained the demurrer without leave to amend. The superior court's decision was affirmed by this court in an unpublished opinion.

(*Montegani v. Johnson* (May 21, 2003, F041158).) The opinion stated:

“The only issue raised by [Montegani] on this appeal is whether a cause of action in tort for intentional interference with economic advantage includes interference with a prospective right to inherit. (See Rest.2d Torts, § 774B.) We conclude it does not.”<sup>1</sup>

The second round in the litigation between the parties started with defendants' petition to enforce an irrevocable trust's no contest clause against Montegani. The superior court sustained Montegani's demurrer without leave to amend. Defendants filed an appeal and this court reversed the superior court and concluded that, as a matter of law, Montegani's March 2002 complaint against her siblings triggered the no contest clause of the irrevocable trust. (*Johnson v. Montegani* (Aug. 29, 2006, F048577) [nonpub. opn.].)<sup>2</sup>

Almost two years after our decision regarding the no contest clause, Montegani filed the complaint for damages that is the subject of this appeal. The caption of the complaint identified its legal theory of recovery as “undue influence.” Some of the complaint's allegations are set forth in the following three paragraphs.

When Lena M. Cassinerio died, she was approximately 75 years old. Prior to her death, Lena M. Cassinerio was ill, weak, and unable to take care of herself. Her assets

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<sup>1</sup>The March 2002 complaint and our unpublished opinion in case No. F041158 were included in defendants' request for judicial notice in support of their demurrer to Montegani's complaint for undue influence.

<sup>2</sup>On page 2 of their appellate brief, defendants incorrectly described the matter by asserting that they “obtained a ruling that [Montegani]'s First Complaint had violated the no-contest clause of one of decedent's trust instruments and this Court affirmed that decision.”

included two annuities she purchased from Northbrook Life Insurance Company. She had named her four children as equal beneficiaries of the annuities when she purchased them. At the time of her death, the annuities had a value of approximately \$400,000.

Prior to Lena M. Cassinerio's death, Johnson moved her out of her own house and into Johnson's residence and then moved her into a care facility. During this time, Lena M. Cassinerio depended upon defendants for her daily care and needs and reposed trust and confidence in them. Defendants used their position to isolate their mother and to prevent Montegani from having contact with her. Defendants also made derogatory statements about Montegani and her son to their mother and then unduly influenced their mother to change the allocation of her estate, including the persons named as beneficiaries of the annuities. Specifically, defendants caused their mother to exclude Montegani as a beneficiary of the annuities and to name the three defendants as equal beneficiaries.

Montegani alleges that defendants took advantage of their mother's weakened mental and physical state as well as the trust and confidence she placed in them to exert undue influence over her for their own gain and the detriment of Montegani. Montegani requests damages for the money that is lawfully hers and for the emotional injury caused by defendants' malice, fraud, and oppression with a conscious disregard for her rights. She also requests punitive damages.

In November 2008, defendants filed a notice of demurrer that asserted the complaint failed to state facts sufficient to constitute a cause of action. In particular, the defendants asserted the present action was barred by the statute of limitations and by the doctrine of res judicata or collateral estoppel due to the decision rendered in Montegani's prior lawsuit against them.

Defendants supported their demurrer by filing a request for judicial notice of (1) Montegani's complaint for damages filed March 19, 2002, in Stanislaus Superior Court case No. 309454, (2) this court's May 21, 2003, opinion in case No. F041158, and (3) this court's August 29, 2006, opinion in case No. F048577.

In December 2008, the superior court held a hearing on defendants' demurrer to Montegani's August 2008 complaint. The court's written ruling sustained the demurrer without leave to amend based on the following rationale:

"This action is barred by the collateral estoppel effect of the final judgment adverse to [Montegani] in action No. 309454 before this Court. [Montegani] split her causes of action in an attempt to avoid the no-contest clause in the will at issue, and loses because of a prior adverse judgment in an action arising from the same nucleus of operative fact."

Montegani filed a notice of appeal in February 2009. In December 2009, a judgment of dismissal was filed in the superior court and, shortly thereafter, this court stated it would treat Montegani's appeal as taken from that appealable judgment rather than a nonappealable order.

## **DISCUSSION**

### **I. Standard of Review**

When "reviewing a demurrer that is sustained without leave to amend, an appellate court assumes the truth of (1) all facts properly pleaded by the plaintiff, (2) all facts contained in exhibits to the complaint, (3) all facts that are properly the subject of judicial notice, and (4) all facts that reasonably may be inferred from the foregoing facts. [Citations.]" (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305.) In contrast, an appellate court must independently decide all issues of law and, thus, may not accept the truth of legal contentions, conclusions of law, or deductions drawn from those legal contentions or conclusions when reviewing the sufficiency of the allegations. (*Ibid.*)

Reversal is required if the complaint has stated a cause of action under any possible legal theory or the plaintiff has shown there is a reasonable possibility any defect identified by the defendant can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The burden of proving a reasonable possibility of cure is squarely on the plaintiff. (*Ibid.*) Under this burden, a "[p]laintiff must show in what manner he can

amend his complaint and how that amendment will change the legal effect of his pleading.” (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.)

## **II. Res Judicata and the Rule Against Splitting a Cause of Action**

### **A. Background on Rule Against Splitting a Cause of Action**

In 1944, the California Supreme Court described the rule against splitting a cause of action as follows:

“It is clearly established that a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim. [Citations.]” (*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 894.)

More recently, the California Supreme Court has stated that “[t]he rule against splitting a cause of action ... is in part a rule of *abatement* and in part a rule of *res judicata*.” (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1146.) The rule against splitting a cause of action and the underlying primary right theory prevents the enforcement of a primary right in two suits

“‘by either of two means: (1) if the first suit is still pending when the second suit is filed, the defendant in the second suit may plead that fact in *abatement* (Code Civ. Proc., § 430.10, subd. (c) [“There is another action pending between the same parties on the same cause of action.”]; ...); or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of *res judicata* (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 638-640).’ (Italics added.)” (*Hamilton v. Asbestos Corp.*, *supra*, at p. 1146.)

In this appeal, Montegani’s two lawsuits were not pending at the same time. Therefore, whether she violated the rule against splitting her cause of action must be decided by applying the principles of *res judicata* rather than the principles governing *abatement*.

### **B. Basic Principles of Res Judicata and the Primary Right Theory**

The California Supreme Court explained the primary right theory underlying the state’s doctrine of *res judicata* in *Crowley v. Katleman* (1994) 8 Cal.4th 666:

“The primary right theory is a theory of code pleading that has long been followed in California. It provides that a ‘cause of action’ is comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.]

“As far as its content is concerned, the primary right is simply the plaintiff’s right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: ‘Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.’ [Citation.] The primary right must also be distinguished from the *remedy* sought: ‘The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.’ [Citation.]” (*Crowley v. Katleman*, *supra*, 8 Cal.4th at pp. 681-682.)

In applying the foregoing principles to this case, we note the importance of the injury or injuries suffered by the plaintiff in determining whether more than one primary right was violated. “Under the ‘primary rights’ theory adhered to in California it is true there is only a single cause of action for the invasion of one primary right. [Citation.] But the significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive.” (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954 (*Agarwal*), disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4; see generally Heiser, *California’s Unpredictable Res Judicata (Claim Preclusion) Doctrine* (1998) 35 San Diego L.Rev. 559, 576 [regardless of the multiple legal theories available, “one injury gives rise to one cause of action”].)

In *Agarwal*, the court concluded that causes of action for defamation and intentional infliction of emotional distress under state law were separate from the cause of action for discrimination in violation of a federal labor statute, even though the federal and state claims arose from the same set of operative facts. (*Agarwal*, *supra*, 25 Cal.3d at p. 954.) The federal labor statute prohibiting discrimination limited the plaintiff’s recovery of monetary damages to back wages, while the state claims for defamation and

infliction of emotional distress allowed recovery for injuries that were distinct from lost pay. (*Id.* at p. 955.) Based on the difference in the injuries sought to be remedied in the two lawsuits, the court concluded each lawsuit involved a different primary right.

In comparison, Montegani has sought to remedy the same injury in both of her lawsuits—namely, her loss of a one-quarter share of the annuities worth \$400,000. Consequently, we conclude that Montegani has attempted to bring two lawsuits to enforce a single primary right (the right to receive one-fourth of \$400,000) and, therefore, her second lawsuit is barred by the principles of res judicata.

Based on the foregoing, we need not address the issues involving collateral estoppel or the statute of limitations.

### **DISPOSITION**

The judgment of dismissal is affirmed. Defendants shall recover their costs on appeal.

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DAWSON, Acting P.J.

WE CONCUR:

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HILL, J.

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KANE, J.